more profitable business would be secured if the three services of documentation, loading and stevedoring could all be provided by the family business which pre-war had confined itself to documentation.

I would accordingly allow this appeal with costs here and below and order that the declarations and orders prayed for in the plaint be made — the costs to be paid by respondents other than infants. The deposit in Court will be paid to the appellants.

Appeal allowed.

Solicitors: *T. K. Sen; Bannon & Bailey.*

LIAN WAH CONTRACTORS v. V. GOPAL & ANOR.

[A.C.J. (Murray-Aynsley C.J.) November 29, 1954]

[Singapore — District Court Appeal No. 27 of 1954]

Labour Ordinance (Cap. 69), s. 45 — Sub-contractor for labour — Claim by — Money due under sub-contract and "extras" — Whether claim for "wages" — Jurisdiction of Controller.

In this case the respondents entered into a sub-contract for the construction of a road. The head contractor supplied the materials, the respondents the tools. The contract was for the making of a considerable stretch of road at so much a square yard, for which the respondents seem to have employed at times more than 50 men each. There were disputes relating to the conditions or period of employment, to advances of goods or money, to wages or to keeping accounts. The respondents claimed money due under the sub-contract and considerable sums for "extras". The learned Asst. Commissioner for Labour decided that the dispute fell within his jurisdiction under s.45 of the Labour Ordinance and found for the respondents as claimed. It was admitted on appeal that if the Controller had jurisdiction what was claimed must be brought within the category of "wages".

Held: (1) the fact that sub-employment by the "labourer" was contemplated in every case did not prevent his remuneration from being in the category of "wages"; (2) in the circumstances of the case to describe the claim as one for "wages" would be to give that word a quite unnatural meaning, and therefore the Controller lacked jurisdiction.

DISTRICT COURT APPEAL.

L. A. J. Smith for the appellants.

R. K. Booker for the respondents.

Cur. Adv. Vult.

Murray-Aynsley C.J.: — This appeal raises a question of jurisdiction. Section 45 of Cap. 69 confers jurisdiction in certain cases; this jurisdiction depends on the status of the parties, and the nature of the cause of action. As regards parties, there must be a dispute between an employer and a labourer. "Employer" and "Labourer" are defined in section 2. Further by sub-section 6 of section 45 "labourer" includes a sub-contractor for labour. The last phrase is not defined.

In the present case the respondents entered into a sub-contract for the construction of a road. The head contractor supplied the materials, the respondents the tools. As these were of a very simple character, I am prepared to agree that the respondents were sub-contractors for labour within the meaning of the sub-section.

However, the jurisdiction is limited to certain causes of action. These are disputes relating to the conditions or period of employment, to advances of goods or money, to wages or to keeping of accounts. In the present case the respondents claimed money due under the sub-contract and considerable sums for "extras". It is admitted that if the Controller has jurisdiction what is claimed must be brought within the category of "wages". The matter is not without difficulty and I do not think that the fact that sub-employment by the "labourer" is contemplated in every case prevents his remuneration from being in the category of "wages". But in the present case the contract was for the making of a considerable stretch of road at so much a square yard, for which the respondents seem to have employed at times more than 50 men each. In these circumstances it seems that to describe the claim as one for "wages" would be to give that word a quite unnatural meaning. Therefore, I find that the Controller lacked jurisdiction and his award must be set aside.

Appeal allowed with costs. Deposit to appellants.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Allen & Gledhill.*

THE FIRM OF A.M.K.M.K. v. M. RM. PERIANAN CHETTIAR

[P.C. (Lord Oaksey, Lord Morton of Henryton and Lord Keigh of Avonholm) January 11, 1955]

[Privy Council Appeal No. 23 of 1954]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 8 — Debtor and creditor carrying all payments made by either of them to a current account — Payments made during Occupation period — Credit balance offsets pre-Occupation debts — Meaning of "first".

Where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is, the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account.

In this appeal, it was alleged in the statement of claim, and admitted by the defence, that the appellants were a firm of moneylenders carrying on business at 35 New Lane, Penang; that the respondent was also a moneylender carrying on business at the same premises; and that in or about the month of February, 1939, the appellants and the respondent commenced to have dealings between each other on current account, on terms that interest on the appropriate balances should be calculated and debited at the end of every six monthly period in such account, in accordance with the usual Penang current account rate as fixed by Chettiar custom from time to time. Both debtor and creditor carried all payments made by either of them to the other to the current account, and if there had been no statutory provision to the contrary the pre-Occupation debt would have been discharged by the payments made by the respondent between February 15, 1942, and January 4, 1943. All these payments were payments made during the Occupation period.

Held: (1) each subsequent payment by the respondent during the Occupation period must be treated as having been applied first to any debit balance arising during the Occupation period and existing at the time of the payment, and, subject thereto, must be treated as having been applied in reduction of the pre-Occupation debt; (2) the word "first" in s.8 of the Debtor and Creditor (Occupation Period) Ordinance implies that there is some other purpose to which a payment made during the Occupation period may be applied.

Cases referred to:—

(1) *In re Sherry* 25 Ch. D. 692.

(2) *Clayton's Case* 1 Mer. 572.

PRIVY COUNCIL APPEAL from the Court of Appeal of the Federation of Malaya, reported in (1952) M.L.J. 195.

Phineas Quass Q.C. (*Dingle Foot* with him) for the appellants.

Milner Holland Q.C. (*T. A. C. Burgess* with him) for the respondent.

Cur. Adv. Vult.

Lord Morton of Henryton : — This is an appeal from a judgment and decree of the Court of Appeal of the Federation of Malaya dated the 21st March, 1952, which upheld a judgment and decree of the High Court of the Federation of Malaya at Penang dated the 31st August, 1951, dismissing the action brought by the appellants against the respondent.

The issues in the action are clearly and simply set out in the pleadings, to which their Lordships will at once refer. It is alleged in the statement of claim, and admitted by the defence, that the appellants are a firm of moneylenders carrying on business at 35, New Lane, Penang; that the respondent is also a moneylender carrying on business also at 35, New Lane, Penang; and that in or about the month of February, 1939, the appellants and the respondent commenced to have dealings between each other on current account, on terms that interest on the appropriate balances should be calculated and debited at the end of every six monthly period in such account, in accordance with the usual Penang current account rate as fixed by Chettiar custom from time to time.

Paragraphs 4—6 of the statement of claim are in the following terms:—

"4. This current account was continued and carried on between the plaintiffs and the defendant up to the beginning of the occupation period and there was as on the 15th day of February, 1942, a sum of $49,900 due and payable by the defendant to the plaintiffs.

5. This current account was continued to be operated during the occupation period and was closed on or about the 6th day of August, 1945, there being no balance due and payable by the defendant to the plaintiffs as on that date.

6. The plaintiffs are entitled to be repaid by the defendant the said sum of $49,900 being the pre-occupation debit balance against the defendant on the said account having regard to the provisions of section 8 of the Debtor and Creditor (Occupation Period) Ordinance 42 of 1948."

Then follows a claim for the sum of $49,900 with certain interest.

The vital portion of the defence is paragraph 2 which is as follows:—

"2. As to paragraphs 4 and 5 of the statement of claim the defendant says that the current account referred to was carried on and continued to be operated by the parties from February, 1939, until August, 1945, and that the credit balance of $49,900 in favour of the plaintiffs, as on the 15th day of February, 1942, was paid off by reason of the plaintiff's drawings by the 4th day of January, 1943, on which date the amount standing to the credit of the plaintiffs was nil."

As the appellants rely upon the terms of the Debtor and Creditor (Occupation Period) Ordinance 1948 (No. 42 of 1948) it is convenient at this point to set out certain portions of that Ordinance.

The Ordinance is headed "An Ordinance to regulate the relationship between Debtors and Creditors in respect of debts incurred prior to and during the period of the enemy occupation of the territories comprising the Federation of Malaya". It came into force on the 1st October, 1949.

Section 2(1) contains the following definitions:—

"In this Ordinance, unless the context otherwise requires the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

'debt' means a sum certain in money payable by virtue of a legal obligation and recoverable when due by process of law;

'Malayan currency' means the dollar currency in circulation and constituting legal tender in the territories now comprising Malaya before or after the occupation period;

'occupation currency' means any currency issued by the Occupying Power and in circulation during the occupation period, but does not include Malayan currency;

'occupation debt' means a debt payable by virtue of an obligation incurred during the occupation period and accruing due at any time;

'occupation period' means the period commencing on the fifteenth day of February, 1942, and ending on the fifth day of September, 1945, both dates inclusive, and includes any part of such period;

'pre-occupation debt' means a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time;

'time essence contract' means a contract the parties to which intended that it should be of the essence of the contract that payments under it should be made on a date or dates certain."

Section 3 provides that, subject to the provisions of section 7, any pre-occupation debt which still remains wholly unpaid at the commencement of the Ordinance shall be payable in full with interest calculated in a manner there specified.

Section 4 so far as material is as follows:—

"(1) Subject to the provisions of sub-section (2) of this section, where any payment was made during the occupation period in Malayan currency or occupation currency by a debtor or by his agent... to a creditor or to his agent... and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.

(2) In any case—

(a) where the acceptance of such payment in occupation currency was caused by duress or coercion; or

(b) where such payment was made after the thirty-first day of December, 1943, in occupation currency in respect of a pre-occupation capital debt, exceeding two hundred and fifty dollars in amount, which—

(i) was not due at the time of such payment; or

(ii) if due, was not demanded by the creditor or by his agent on his behalf and was not payable within the occupation period under a time essence contract; or

(iii) if due and demanded as aforesaid was not paid within three months of demand or within such extended period as was mutually agreed between the creditor or his agent and the debtor or his agent; or

(c) where such payment was made in occupation currency to a Custodian or liquidation officer in respect of a pre-occupation capital debt exceeding two hundred and fifty dollars in amount except where payment as aforesaid was caused by duress or coercion;

such payment shall be revalued in accordance with the scale set out in the Schedule to this Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation."

Section 5 provides that any payment made during the occupation period by a debtor or his agent to a creditor or his agent in respect of an occupation debt shall be a valid discharge of such debt to the extent of the face value of such payment.

Section 6 deals with occupation debts which still remain unpaid at the commencement of the Ordinance and need not be set out here.

Section 7 makes certain special provisions in regard to bank accounts.

Section 8 must be quoted in full:—

"For the purposes of this Ordinance—

(a) any payment made by, or on behalf of any person into any bank or other account during the occupation period shall be deemed to have been applied first to any debit balance, or part thereof, which arose during the occupation period and was still outstanding against such person in such account at the time when such payment was made: and

(b) any withdrawal made by, or on behalf of, any person from any bank or other account during the occupation period shall be deemed to have been applied first against any credit balance, or part thereof, which arose during the occupation period and was still outstanding in favour of such person at the time when such withdrawal was made."

The Schedule sets out a sliding scale of the value of occupation currency from February, 1942 to 13th June, 1945. It is only necessary to state that during the year 1942 occupation currency is treated as being of the same value as Malayan currency, that in January, 1943, 105 occupation dollars are treated as being equivalent to 100 Malayan dollars and thereafter the value of occupation currency diminishes, at first slowly but latterly very rapidly, until on the 6th August, 1945, the figure is 35,500, on the 12th August the figure is 95,000 and on the 13th August occupation currency becomes valueless.

No oral evidence was called at the trial but certain documents were put in, including Exhibit No. 1 which shows the current account of the respondent, as kept in the books of the appellants, from October, 1941, onwards. The books kept by the respondent agree in every particular with Exhibit No. 1.

Up to the 6th August, 1945, the account shows frequent entries to the credit and debit of the respondent, and the balance is struck and interest debited every six months, in April and October each year.

The account shows that on the 17th October, 1941, the respondent's account was in debit to the amount of $41,900 and at the beginning of the occupation period (15th February, 1942) the debit balance had risen to $49,900, the amount now claimed. Throughout the occupation period and thereafter the account continued to be kept in the same way as before.

The debit balance against the respondent tended to decrease after the 15th February, 1942, and on the 4th January, 1943, he made a payment of $1,550 which exactly cleared off the amount of his then debit balance. Many further debit and credit entries are recorded until on the 6th August, 1945, the respondent paid a sum of $31,400 which cleared off his debit balance as at that date. This is the last entry before the occupation period ended on the 5th September, 1945. From that date onwards only a few small dealings took place between the parties.

The respondent accepts as correct the allegation in paragraph 4 of the statement of claim that a sum of $49,900 was due and payable to the appellants when the occupation period began, but, as appears from his defence, he contends that he discharged that debt by

a series of payments the last of which was the payment of $1,550 on the 4th January, 1943.

Counsel for the appellants contended that none of the payments made during the occupation period could be applied in or towards discharge of a pre-occupation debt and they relied upon section 8 of the Ordinance. They first suggested that as section 8 applies only to payments and withdrawals made during the occupation period, a line should be ruled across the account immediately below an entry of $200 to the credit of the respondent on the 11th February, 1942. So far their Lordships agree, as this was the last pre-occupation entry. It reduced the total sum standing to the debit of the respondent to $49,900, and that sum, in their Lordships' view falls exactly within the definition (already quoted) of a pre-occupation debt which appears in section 2(1) of the Ordinance.

Counsel went on to suggest that a second line should be ruled immediately below the credit of $31,400, already mentioned, which appears at the date 6th August, 1945. Between these two lines are recorded all the debits and credits during the occupation period, and counsel contended that, by virtue of section 8*(a)* of the Ordinance, every payment made by the respondent during that period must be set off against sums drawn by him from the appellants during the same period, and no such payment could be applied to reducing the pre-occupation debt of $49,900.

It is common ground between the parties that the common law of England must be applied in the present case, except in so far as it is expressly varied by the terms of the Ordinance. See section 2(1) of the Civil Law Enactment 1937 (No. 3 of 1937). The common law rule applicable to the circumstances of this case is stated by Lord Selborne in *In re Sherry*[1]:—

"The principle of Clayton's Case (1 Mer. 572 at page 605) and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account."

In the present case, both debtor and creditor carried all payments made by either of them to the other to a current account, and if there had been no statutory provision to the contrary the pre-occupation debt would have been discharged by the payments made by the respondent between the 15th February, 1942, and the 4th January, 1943. All these payments, however, were payments made during the occupation period, and section 8 of the Ordinance applies to them. Their Lordships agree with Pretheroe J. that the effect of section 8 can conveniently be illustrated by considering the first entry made in the accounts after the beginning of that occupation period. That entry recorded a payment of $700 by the respondent to the appellants. On that date there was no "debit balance which arose during the occupation period", and counsel for the appellants contended that it could not be applied in reduction of the pre-occupation debt of $49,900 but must be deemed to have been held in suspense until there appeared in the account a debit balance arising during the occupation period. Their Lordships cannot accept this contention. By section 8 of the Ordinance such a payment is to be deemed to have been applied *first* to any debit balance which arose during the occupation period. In order to give effect to the appellants' contention it would be necessary to read the word "first" as meaning "exclusively". In their Lordships' view this is an impossible construction. The word "first" implies that there is some other purpose to which a payment made during the occupation period may be applied. As there was no debit balance arising during the occupation period at the time when the payment of $700 was made, section 8 does not cover the case and there is nothing to prevent the $700 being applied, in accordance with the rule in *Clayton's Case*[2], in reduction of the pre-occupation debit. Similarly, each subsequent payment by the respondent during the occupation period must be treated as having been applied first to any debit balance arising during the occupation period and existing at the time of the payment, and, subject thereto, must be treated as having been applied in reduction of the pre-occupation debt of $49,900. Each payment applied in the latter manner is, in their Lordships' view, a "payment made during the occupation period . . . by a debtor . . . to a creditor . . . in respect of a pre-occupation debt", within section 4 of the Ordinance, and is, therefore, "a valid discharge of such pre-occupation debt to the extent of the face value of such payment" by virtue of the same section. By these means the pre-occupation debt of $49,900 was fully discharged on the 4th January, 1943, and the appellant's claim fails.

Subsection (2) of section 4 can have no application to the present case, since there is no suggestion of duress or coercion and all the payments which discharged the pre-occupation debt were made before the 31st December, 1943.

For these reasons their Lordships will humbly advise Her Majesty that this Appeal should be dismissed. The appellants must pay the respondent's costs.

Appeal dismissed.

Solicitors: *Lim Kheng Kooi; Presgrave & Matthews.*

ANG CHWEE KEONG v. REGINA.

[A. Cr. J. (Spenser-Wilkinson J.) January 17, 1955]

[Penang — Criminal Appeal No. 58 of 1954]

Common Gaming Houses Ordinance, 1953, ss. 4(1)(c) & 11 — Charge of assisting in carrying on a public lottery — Evidence of expert — Admissibility — Prejudicial evidence.

This was an appeal against the conviction of the appellant on a charge of assisting in carrying on a public lottery an offence under s.4 (1) (c) of the Common Gaming Houses Ordinance 1953. At the trial an expert gave evidence regarding certain documents found in the appellant's possession and said they were betting slips and records of stakes. The expert gave no reasons for his opinion. The learned Magistrate relied on the evidence of the expert and convicted the appellant.

Held: (1) it was the duty of the Magistrate in this case to look at the documents and decide for himself, with the assistance of the expert, whether or not the documents were accounts, memoranda or records of stakes and wages relating to a lottery within the meaning of s. 11 of the Common Gaming Houses Ordinance; (2) as the Magistrate in this case appeared to have relied entirely upon the bare expression of opinion of the expert, the presumption under s. 11 of the Ordinance did not arise and the prosecution had therefore failed to prove its case.

One of the prosecution witnesses gave evidence as follows: "On 12-9-54 at 14.30 hours I received information on oath from an informer to the effect that the proprietor of a sundry shop 3359, Bagan Dalam Road, Butterworth was assisting in carrying on a 100 and 1000 character lottery."

Held: this evidence was clearly inadmissible and prejudicial. In criminal cases Judges should not wait for objections to inadmissible evidence to be taken but should intervene to prevent such evidence being given. The same principle applied to a Magistrate's Court; and if as might happen evidence of this kind slipped out before a witness could be stopped then the Magistrate should make a note that it was inadmissible and should entirely eradicate the effect of such evidence from his mind.

Case referred to:—

(1) *Sim Ah Song v. Rex* (1951) M.L.J. 150.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Kheng Kooi for appellant.

D. C. Jackson (Senior Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was charged under Section 4(1)(c) of the Common Gaming Houses Ordinance, 1953 with assisting in carrying on a public lottery, to wit "Characters Lottery" and was convicted and sentenced to six months' imprisonment. The only question in the appeal was whether or not the documents found in the appellant's possession were such as to raise the presumption that arises under Section 11 of the Ordinance, which reads as follows:—

"11. A person selling, offering for sale, giving, delivering or collecting lottery tickets or found in possession of ten or more lottery tickets or counterfoils or duplicates of lottery tickets or of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery shall be presumed until the contrary is proved to be assisting in a public lottery then in progress."

An expert on the 100 and 1,000 number lotteries, P.W. 3 gave evidence explaining the system. Having explained generally how lotteries of this kind worked he stated:—

"When a person wishes to stake on either the 100 or 1,000 number lotteries, he goes to a collector of bets and informs him either verbally or by giving a betting slip to the collector in which are written numbers chosen and the amount of stake for each number. As soon as the money is received the collector of bets prepares a receipt in duplicate and gives the punter a copy and he himself retains the other. As each punter comes in to place his bets the collector also records the stakes on a sheet of paper called a Record of Stakes."

He goes on to say that at the close of the takings the collector hands over the Record of Stakes to the organiser.

The expert then stated that documents Ex. P. 4A, B and C were betting slips of 100 and 1,000 number lotteries totalling $7 and that Ex. P. 4A and P. 4B were original receipts. He gave no reasons for this opinion. He further stated:—

"P.4C is a carbon copy of 100 and 1,000 character lotteries, $38.75. P.4C would be in the possession of a collector only."

He gave no reasons for this opinion either. He then stated:—

"P.7 is a writing pad containing carbon copy receipts on 100 and 1,000 character lotteries; total amount of bets $29. The possessor of these exhibits P.4 and P.7 would be a collector."

No reasons were given for this opinion.

When one looks at the Exhibits P. 4A, B and C one finds they contain columns of figures one below the other which look like sums in dollars and cents though the $ sign is absent and each column has an addition at the foot. The addition is correct in each case. It is quite impossible for any ordinary person to say by looking at these documents how they could be said to be a statement of numbers chosen with the amount of stakes for each number. In the case of Ex. P. 4A it is impossible from looking at the document to discover how the expert arrived at the total of $7 which he says is the total amount staked.